



State of Connecticut

DIVISION OF PUBLIC DEFENDER SERVICES

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***Raised Bill No. 1479
An Act Concerning Judicial Branch Openness***

Public Hearing - April 9, 2007

While not opposed to *Raised Bill No. 1479, An Act Concerning Judicial Branch Openness* in its entirety, the Office of Chief Public Defender has concerns in regard to certain sections as proposed and shall articulate such as it relates to each section of this Raised Bill.

Certain sections of this bill impact upon the records and proceedings of persons who have been arrested for the commission of a crime for whom an attorney, employed by the Division of Public Defender Services, has been appointed to represent them. The mission of the Division of Public Defender Services, a state agency, is to provide legal representation in criminal matters,

post-conviction proceedings including habeas corpus proceedings arising from criminal matters, extradition proceedings and juvenile delinquency matters. The provision of legal representation is guaranteed by the state and federal constitutions to indigent persons accused of committing a criminal offense where there is a risk of conviction, loss of liberty through incarceration and in certain cases, death through the imposition of the death penalty. The Annual Report of the Chief Public Defender for 2006 reported that during the fiscal year 2005-06, the Division of Public Defender Services was responsible for a total of 89,244 cases.

Sections 6 and 7 - The Office of Chief Public Defender *does not support* sections 6 and 7 because of the negative impact the postings may have on the accused in his/her employment, public housing and education.

Any person accused of a criminal offense has a state and federal constitutional right to the presumption of innocence and due process. The posting of the information on the Internet would exist in perpetuity long after the case is disposed. The posting of the original charges would continue to be public even if the charges were subsequently reduced. This is so because the pretrial criminal docket information pertaining to any person who is subsequently convicted could be printed out or downloaded and kept forever. In addition, allowing the birth date of an accused to be posted on the Internet may increase the risk of identity theft, especially in those cases where the accused is sentenced to a substantial period of incarceration.

Most importantly, however, a disposition in a criminal case is not always in the form of a conviction. The mere existence of an arrest, especially in those cases where it has been determined in a court of law that a person did not commit the crime for which s/he was arrested for can result in the termination or removal of the accused from his/her employment and public housing. A case may be nolle, dismissed, not prosecuted, found not guilty after trial or exonerated. Pursuant to this recommendation, such information could continue to exist. This would be contrary to the existing erasure law. Once the information is on the Internet, there is no way to take back or erase the information.

The Office of Chief Public Defender is concerned that greater access to court records which may subsequently become erased records as such pertain to dismissals, nolle, pardons and not guilty verdicts will impact upon persons who have been wrongly accused, been found not guilty or been exonerated. Cases exist in which a defendant has been misidentified by a victim or witness, exonerated by DNA, or acquitted after a jury trial. There are also cases in which a person may have been pardoned for a crime that occurred many years ago. There is no good reason for the information to continue to exist and many reasons for it not to be disseminated further.

Lastly, there is a concern that the greater access by the public to the court records augments the risk of identity theft, especially if filed documents contain identifiable information. The bill would permit disclosure of the docket number,

name of the defendant, birth date and charge. Although as drafted the language of the bill takes into consideration the risk of identity theft and attempts to address this through limiting disclosure of the full birth date of the defendant, this precaution should be applicable to all cases which are available on the internet.

Section Eight - The Office of Chief Public Defender supports that portion of this section which requires that a motion seeking an extension of an order to seal or limit disclosure be heard by the court on the record. Although not opposed to requiring a date certain for the termination of a sealing order, the Office of Chief Public Defender *does not support* the 90 day time period for which an extension of a sealing order may enter because this time period is excessive. Instead it is suggested that the period of time be no more than 14 days. In addition, the state should be required *to articulate* on the record why the sealing of the search warrant or limited disclosure is warranted. Anecdotal information indicates that "continuing investigation" is usually the reason cited when seeking an extension of a sealing order. However, this phrase offered without further information is insufficient. Language should be added to this section which requires the prosecution to continue to demonstrate why it is necessary to continue a sealing order or limit disclosure whenever such a motion is made. In the interest of fairness to the accused, who is presumed innocent during this pre-trial period, permitting a continued sealing for lengthy periods of time without articulation of a legal basis or demonstration of a real need is not acceptable. As

it is believed that the majority of warrant affidavits are not sealed, the state would not be subject to an unwarranted burden.

Section Ten - The Office of Chief Public Defender **supports that portion** of the language as proposed in this section which requires that the court seal, but only to the public the competency evaluations completed pursuant to C.G.S. §54-56d. A competency evaluation contains much information which is confidential and/or privileged pursuant to state and/or federal law. The *entire* medical, psychological and psychiatric history of a defendant is typically included. Information provided by the defendant to the psychiatrist is protected by a privilege. Pursuant to current law, such privileged and/or confidential information is not accessible by anyone except with the authorization of the defendant.

Since the privilege belongs to the defendant, it is solely his/hers to waive. A motion for a 54-56d evaluation may be made not only by defense counsel, but also by the state or the court on its own motion. Since the defendant is the subject of the competency inquiry, it is impossible to conceive how a waiver occurs when others have sought the evaluation. Therefore, the evaluation should always be filed under seal with the court clerk.

However, the Office of Chief Public Defender **does not support** the language of the proposal which would allow for public disclosure of the evaluation if admitted as an exhibit, relied upon by a participant in his/her testimony, the questioning or arguments to the court, or, if used as a basis for the

competency finding of the court. For these same reasons as aforesaid, the competency evaluation should remain sealed even if admitted as an exhibit in a competency hearing or considered by the court in any way.

Section Eleven - The Office of Chief Public Defender **supports that portion** of the section which requires that the "alternate incarceration assessment report" be sealed upon filing with the court. However, it does **not support** providing access to the public in the event that the court orders a person to participate in such an alternate incarceration program. Currently the "alternate incarceration assessment report" is part of the Pre-sentence Investigation Report (PSI) in which it is added at the end of such. A court has the discretion to order some or all of the plan as conditions of probation. When this occurs, the court has the ability to, and usually does, articulate on the record those portions of the plan which shall be conditions of probation. Because this is done on the record at sentencing, there is a transcript which is available to the public. The concern is that if the court orders only some of the plan or a different plan as a condition of probation, this proposed legislation would allow for the disclosure of information that was not ordered by the court. There is no need for the disclosure of proposed conditions.

The Office of Chief Public Defender has advocated against the public disclosure of the PSI through its letter dated July 11, 2006 to Justice Richard Palmer, a copy of which is attached and made a part of this testimony. In that letter, this office stated that "[a]ny attempt to develop a system wherein only

certain information from the PSI would be disclosed is fraught with problems. Such a system may necessitate hearings, which may need to be closed from the public, to decide what information may be made public. This could be costly and lead to inconsistent results." There is so much information which is personal in nature not only in regard to the defendant, but in regard to family members and the victim. Consistent with the opinion that any information in the PSI should remain confidential, the Office of Chief Public Defender cannot support this proposed language.

Section Thirteen - The Office of Chief Public Defender does not object to the concept of permitting cameras in the Supreme Court and Appellate Court. However, consent of the defendant should be obtained prior to permitting cameras to broadcast, record, televise and photograph such proceedings. Without the consent of the defendant, such should not occur. A burden should not be imposed upon the defendant to object to such especially in light of the practice wherein the defendant is not permitted to be present during oral argument before the Appellate or Supreme Courts despite being a party and the subject of the litigation.

Especially in cases involving juveniles in delinquency matters, the Office of Chief Public Defender respectfully submits that the consent of the juvenile and his/her counsel should be obtained prior to permitting cameras to record. The identities of juveniles and any identifiable information pertaining to the juvenile should remain confidential. In a time when re-entry of offenders is the subject of

serious discussions, it is important that the individuals and facts pertaining to juvenile cases which are confidential not become an obstacle to the juvenile as he/she becomes an adult because the recording was accessible to the public long after the disposition of the case.

Section Fourteen - While not opposed to the concept of creating a pilot program, the Office of Chief Public Defender respectfully submits that at a minimum, the consent of the defendant should always be required prior to the allowance of cameras in the courtroom during any pre-trial proceeding. The Judge or the parties in the matter, which includes the defendant, should have veto-power over whether the proceedings are recorded or broadcast. The Office of Chief Public Defender requests that it be a part of any group that examines the creation of a pilot program for broadcasting the proceedings in criminal court proceedings. The following examples illustrate several of the concerns of this office should cameras be allowed in the courtroom:

- Cameras could impact individual voir dire as it exists pursuant to state statute and the Connecticut constitution. Having cameras in the courtroom during voir dire in a criminal matter could hinder potential jurors from being honest and forthright in their responses. Potential jurors could fear being identified and having their responses broadcast later in the day on the 6 o'clock news.
- Cameras may impact on persons (including their families) employed in the court system, public defenders, prosecutors, judges, court

clerks, court reporters and others including spectators and law enforcement officials who are doing their job.

- Cameras may impact on the person arrested who is presumed innocent until proven guilty under both the state and federal constitutions as prejudice can arise from the mere fact that the person has been arrested.
- Cameras may impact on the family and friends of the person who has been arrested.
- Cameras may on the victim, and/or the family and friends of the victim.
- Cameras may impact on the victim and his/her family by having exhibits, which may at times be graphic and gruesome in detail, broadcast and replayed forever.
- Cameras may impact on the decision of a witness or an expert witness, regardless of whether for the defense or the state, as to whether to come forward and testify in court.
- Cameras may impact upon innocent bystanders who may be in the courtroom for the proceedings.
- Cameras could impact on an order entered by the court to sequester witnesses.
- Cameras could impact on how in camera proceedings, offers of proof and bench conferences are handled.

- Cameras could impact on the proceedings if broadcast later that day in a condensed format so as to present only a snapshot of the proceedings thereby presenting the risk of testimony being taken out of context.

Section Fifteen - For many of the same reasons, as aforesaid, the Office of Chief Public Defender does not support cameras in the courtroom as it pertains to habeas corpus matters and proposes that such proceedings be exempted from this proposed section.

Section 16 - The Office of Chief Public Defender supports that portion of the bill which would require that "juvenile delinquency" and "families with service needs" matters continue to remain confidential.

However, this office does not support that portion of the bill which provides for opening up neglect proceedings in the juvenile court to the public. The reason that this office is opposed to opening up neglect proceedings to the public is because many of the juveniles that are represented by public defenders in juvenile delinquency matters are also the subjects of neglect petitions which may be pending simultaneously in the Superior Court for Juvenile Matters. And as written, this proposal could permit medical and psychiatric information, family and other information pertaining to the juvenile, including schooling, and information pertaining to victims and witnesses to be open to the public in neglect proceedings. If such information and or records were public, it is very

possible that the delinquency proceedings, for which confidentiality exists, would be impacted.

Section 17 - Current law provides that a conversation between the judge and child or youth in a juvenile matter are privileged (C.G.S. §46b-138). The proposed legislation would provide an exception to this privilege by requiring the judge to share with the parents or counsel for the child, "on the record . . . the knowledge gained in any private interview" with the child or youth. The Office of Chief Public Defender opposes this exception as it dilutes the privilege totally and renders the current law meaningless. Furthermore, any privilege can only be waived by the person to whom it belongs. See also, Connecticut Bar Association Ethics Opinion 03-07, Revealing Confidential Information to Parents of a Juvenile Client.

Thank you for the opportunity to be heard in regard to this Raised Bill.